DISTRIBUTED
SEP 18 1997

ORIGINAL

No. 96-8986

Supreme Court, U.S.
FILED
SEP 18 1997
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1996

ARNOLD F. HOHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

ALAN UNTEREINER
EILEEN PENNER
Counsel of Record
ROBERT L. BRONSTON
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

RECEIVED
HAND DELIVERED
SEP 18 1997
OFFICE OF THE CLERK
SUPREME COURT, U.S.

13 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

CONCLUSION 10

TABLE OF AUTHORITIES

Pages

Cases:

Arredondo v. *United States*, 1997 WL 459716 (6th Cir. Aug. 13, 1997) 9

Bailey v. *United States*, 116 S. Ct. 501 (1995) 2-6

Barefoot v. *Estelle*, 463 U.S. 880 (1983) 4, 6

Hardwick v. *Singletary*, 1997 WL 555715 (11th Cir. Sept. 4, 1997) 9

Jackson v. *Virginia*, 443 U.S. 307 (1979) 2

Koo v. *McBride*, 1997 WL 549557 (7th Cir. Sept. 3, 1997) 9

Lindh v. *Murphy*, 117 S. Ct. 2059 (1997) 1, 7-9

Nelson v. *Walker*, 1997 WL 442686 (2d Cir. Aug. 7, 1997) 9

Stromberg v. *California*, 283 U.S. 359 (1931) 3, 4

Tiedman v. *Benson*, 1997 WL 437181 (Aug. 6, 1997) 8

United States v. *Carter*, 117 F.3d 262 (5th Cir. 1997) 9

United States v. *Gaudin*, 115 S. Ct. 2310 (1995) 2, 3

United States v. *Gutierrez*, 1997 U.S. App. LEXIS 17430 (10th Cir. July 11, 1997) (unpublished opinion) 9

United States v. *McKinney*, 1997 U.S. App. LEXIS 17912 (8th Cir. July 16, 1997), on remand, 117 S. Ct. 1544 (1997) 6, 7

United States v. *Ryan*, 41 F.3d 361 (8th Cir. 1994) (en banc) 3

Yates v. *United States*, 354 U.S. 298 (1957) 3, 4

Statutes:

18 U.S.C. § 924(c) 3-6

28 U.S.C. § 2253(c)(2) 1, 2, 5, 7

REPLY BRIEF FOR PETITIONER

The parties in this case are now in agreement: petitioner's claim that he is incarcerated for conduct that does not constitute a crime "may fairly be characterized as 'constitutional,' and * * * the court of appeals erred in concluding otherwise." U.S. Br. 7. After confessing error on the primary point in dispute, however, the government suggests a remand to determine whether petitioner Hohn can make a "substantial showing" within the meaning of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2253(c)(2), concerning his admittedly constitutional claim. For three reasons, a remand for that purpose is unnecessary and the Court should enter an order summarily reversing the decision below.

First, with respect to one of the two constitutional grounds for relief advanced by Hohn, the government fails to provide any reason (and there is none) why the extensive showing already made in Hohn's petition for certiorari might fail to qualify as "substantial." Second, although the government mentions a theory under which claimants who advance arguments analogous to Hohn's second constitutional challenge might fail to make the "substantial showing" required to obtain a certificate of appealability, it cannot bring itself to suggest that *Hohn himself* falls within this category (and he does not). And finally, after Hohn's petition for certiorari was filed, this Court issued its decision in *Lindh* v. *Murphy*, 117 S. Ct. 2059, 2063 (1997), which conclusively establishes that AEDPA's certificate-of-appealability requirement may not be applied retroactively to this case. For all of these reasons, this Court, in light of the government's confession of error, should summarily reverse the Eighth Circuit's decision and remand with instructions to the court of appeals to proceed to the merits of petitioner's appeal.

I

As explained in the petition (at 33-34), Hohn is presently incarcerated for conduct that this Court unanimously held in *Bailey* v. *United States*, 116 S. Ct. 501 (1995), is not a federal crime. The government admits that Hohn's continued incarceration could violate the Constitution in at least two different ways. First, "[a] contention that, in light of *Bailey*, the evidence was insufficient to support a conviction under Section 924(c)(1) may state a claim under the Due Process Clause." See U.S. Br. 8 (citing *Jackson* v. *Virginia*, 443 U.S. 307, 313-16 (1979)). Second, "[a] contention that the jury instructions failed to require the jury to make findings on every essential element of the offense under Section 924(c), as construed in *Bailey*, may state a claim under the Fifth and Sixth Amendments." U.S. Br. 8 (citing *United States* v. *Gaudin*, 115 S. Ct. 2310, 2320 (1995)). The government acknowledges that Hohn has "raised claims of both varieties." *Ibid.*

These concessions should definitively resolve in petitioner's favor the first question presented in the petition for certiorari. The government professes to harbor doubts, however, as to whether "[c]laims of the sort that petitioner raised * * * satisfy Section 2253(c)(2)'s requirement of a '*substantial* showing of the denial of a constitutional right.'" U.S. Br. 9 (quoting 28 U.S.C. § 2253(c)(2)) (emphasis in government's brief). Of course, in order to justify a remand for consideration of the question of substantiality, the government would need to show that some doubt exists on the substantiality question with respect to both constitutional violations. The government, however, has not even attempted to make such a showing.

A. This Court has recently reaffirmed the principle that "[t]he Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of

every element of the crime with which he is charged." *United States* v. *Gaudin*, 115 S. Ct. 2310, 2320 (1995). As we have shown (Pet. 29-30 & n.21, 39-40), the jury instructions on the 18 U.S.C. § 924(c) count at Hohn's trial grossly misstated the law, and Hohn was accordingly deprived of his constitutional right to have a jury determine his guilt beyond a reasonable doubt of every element of that crime. The jury was charged that

> [t]he phrase "used a firearm" means *having a firearm available* to aid in the commission of possession of Methamphetamine with intent to distribute. Similarly, the phrase "carried a firearm" *does not require proof of actual possession* of a firearm or use of it in any affirmative manner, but does require proof beyond a reasonable doubt that the firearm was *available to provide protection* in connection with the possession of Methamphetamine with intent to distribute or facilitate success.

Pet. App. 31a (emphasis added). The government itself conceded below (see Pet. 5, 30 n.21, 34 n.24, 39; Pet. App. 23a) that this instruction allowed the jury to convict Hohn of "using a firearm" under a definition of that crime that is manifestly erroneous in light of *Bailey*.

Although we contend that the jury instructions' definition of "carrying a firearm" is similarly unsupportable (Pet. 39-40), it is important to bear in mind that Hohn's constitutional rights would be violated *even if the "carrying" instruction were entirely proper*. As the Eighth Circuit, sitting en banc, has explained, "a verdict based on jury instructions that provided alternative bases for a finding, one of which is legally inadequate, is presumed to have rested on the insufficient basis." *United States* v. *Ryan*, 41 F.3d 361, 365 (1994). Indeed, that is the holding of this Court's decisions in *Yates* v. *United States*, 354 U.S. 298, 312 (1957), and *Stromberg* v. *California*, 283 U.S. 359, 368 (1931). Not surprisingly, the government makes no attempt to dispute this controlling principle of law, or to suggest that it is inapplicable here. Thus, under established law it must be presumed that Hohn is currently incarcerated for "using

a firearm" even though no jury has ever found beyond a reasonable doubt that his conduct violated 18 U.S.C. § 924(c), as construed by this Court in *Bailey*.

The government concedes (U.S. Br. 8) that Hohn's claim based on the erroneous jury instruction for "using a firearm" qualifies as a claim under the Fifth and Sixth Amendments. Significantly, though, the government offers not the slightest hint of a reason why Hohn has failed to make a "substantial showing" with respect to this constitutional claim. The reason is simple: Hohn's unanswered and undisputed arguments in the petition for certiorari easily satisfy the "substantial showing" standard, which, as the government itself is constrained to admit (U.S. Br. 9), requires no more than a demonstration that the issues are "debatable among jurists of reason; that a court *could* resolve the issues [in a different manner]; or that the questions are *adequate to deserve encouragement to proceed further*." *Barefoot* v. *Estelle*, 463 U.S. 880, 893 n.4 (1983) (internal quotation marks omitted) (emphasis added). Hohn's arguments based on the concededly erroneous "use" instruction and the *Stromberg-Yates* principle amount to much more: they conclusively demonstrate that Hohn *is entitled to relief*.

Although this should be enough to warrant a summary reversal, there is more. The government also pointedly fails to suggest that Hohn has not made a "substantial showing" that the "carrying" instruction given at his trial was legally defective. Here again, the reason is straightforward: the petition for certiorari (Pet. 39-40) clearly demonstrates that the "carrying" instruction largely mirrored the "use" instruction and thus was invalid under *Bailey*. There

being no dispute about the substantiality of Hohn's showing concerning either of his Fifth and Sixth Amendment claims, summary reversal is warranted.[1]

B. As we previously explained (Pet. 34-39), there is a second, independent ground for Hohn's constitutional challenge to his continued incarceration: the evidence presented at his trial was insufficient to support a conviction under Section 924(c)(1). The government acknowledges (U.S. Br. 8) that this shortcoming gives rise to a claim under the Due Process Clause. With respect to *this* constitutional challenge, the government does at least articulate a reason why — in the government's carefully chosen words — "[c]laims *of the sort* that petitioner raised do not *automatically* satisfy" the "substantial showing" requirement of Section 2253(c)(2). U.S. Br. 9 (emphasis added). The government states that "a claim under Section 924(c) that the evidence was insufficient to show a 'use' of a firearm in light of *Bailey* would not constitute a substantial showing of the denial of a constitutional right absent an indication that the evidence was insufficient to show a 'carrying.'" U.S. Br. 9.

Whatever the truth of these generalizations, they have no bearing on this case. It may well be that "[c]laims *of the sort* that petitioner raised" concerning the sufficiency of evidence in his case "do not *automatically* satisfy" the "substantial showing" requirement. But the issue here is whether there is any reason to think that *Hohn's claim* is not supported by a "substantial showing." Tellingly, the government cannot even bring itself to say that Hohn's sufficiency argument, as set forth in detail in our certiorari petition, is not "debatable among jurists of

[1] The government's statement that the retroactivity of AEDPA's certificate-of-appealability requirement is "unlikely * * * to be determinative of the appeal in this case" (U.S. Br. 13) is highly illuminating. It indicates that the government harbors no real doubt that Hohn will easily qualify for a certificate of appealability on remand, if he is required by this Court to secure one from the court of appeals.

reason" and does not present "questions [that] are adequate to deserve encouragement to proceed further." *Barefoot*, 463 U.S. at 893 n.4. In the absence of even an assertion by the government that *Hohn* has failed to make a substantial showing concerning his sufficiency argument, there is no good reason to remand this issue to the court of appeals.

The government's reluctance to assert that Hohn has failed to make such a "substantial showing" is unsurprising, as such an assertion would be wholly implausible. As we explained at length in the ~etition for certiorari (at 35-41), the evidence was woefully insufficient to show beyond a reasonable doubt that Hohn violated Section 924(c) by "carrying" a firearm "during" the predicate offense. Indeed, we are aware of no post-*Bailey* decision of any court of appeals under which the facts of this case would support a conviction for "carrying" a firearm under Section 924(c).

Any doubt about the outcome in the Eighth Circuit, moreover, has been erased by that court's recent decision in *United States* v. *McKinney*, 1997 U.S. App. LEXIS 17912 (8th Cir. July 16, 1997), on remand, 117 S. Ct. 1544 (1997).[2] In *McKinney*, the defendant had been convicted of using or carrying a firearm under Section 924(c) based on the following facts:

> McKinney kept several guns in his heavily fortified compound in a room from which he monitored video cameras that were placed strategically so as to allow him to observe anyone approaching his building. As the government puts it in its supplemental brief, "the four assault weapons from the control room formed the basis for defendant's conviction under 18 U.S.C. § 924(c)" because he was operating "an armed drug fortress" on the day that he was raided.

[2] Not only does *McKinney* establish that there was insufficient evidence that Hohn "carried" a firearm, it also repudiates the Eighth Circuit's misguided waiver doctrine (upon which the district court relied in denying Hohn relief). See Pet. 20-27. Thus, after *McKinney* there can be no serious question *both* that Hohn is actually innocent of the federal crime for which he is currently serving time *and* that the district court's reasons for denying him relief were legally erroneous.

1997 U.S. App. LEXIS 17912, at *3. The Eighth Circuit concluded that these facts did not support a conviction under Section 924(c) either for "using" or for "carrying" a firearm. In fact, the court of appeals stated that it was *plain error* for the trial court to submit the case to the jury on the "carrying" theory, because "[h]aving a gun available for use, even an immediate use, is simply not the equivalent of carrying it." *Id.* at *5; see also *id.* at *4-*5 ("In all of the cases in which we have upheld convictions for carrying guns during or in relation to a drug-trafficking offense, the defendant has had the weapon either in a car's hatchback, in the passenger compartment of a car, or on his person, and was thus carrying the offending weapons in an obvious, literal way."). If it was plain error for the district court to submit a "carrying" charge to the jury in *McKinney*, the same is true *a fortiori* in this case.

Because Hohn has easily made a "substantial showing" with respect to his Due Process Clause claim concerning the insufficiency of evidence that he "carried" a firearm, a remand to the court of appeals for a resolution of that issue is unnecessary.[3] For this reason as well, summary reversal is warranted.[4]

---

[3] Of course, summary reversal on the appealability issue would not preclude the government from raising the "carrying" point at the merits stage of petitioner's appeal.

[4] In urging the Court not to grant plenary review on the waiver issue presented in Hohn's petition (Pet. 21-30), the government states in passing that "a defendant whose constitutional claim is procedurally barred cannot prevail on the merits or make a substantial showing of the denial of a constitutional right." U.S. Br. 14 (internal quotation marks omitted). Here again, the government does not come right out and say that *Hohn* would fail to make a "substantial showing" with respect to his constitutional claims because those claims have been waived. In any event, that argument would be completely untenable because, as previously explained (at note 2), the Eighth Circuit in *McKinney* has repudiated the indefensible waiver doctrine on which the district court based its erroneous decision to deny Hohn relief.

II

After the petition for certiorari was filed, this Court issued its decision in *Lindh* v. *Murphy*, 117 S. Ct. 2059 (1997). *Lindh* held that AEDPA's amendments to Chapter 154 of Title 28 (which includes Section 2253(c), the provision requiring certificates of appealability) do not apply to cases that were pending on the date AEDPA was signed into law. 117 S. Ct. at 2063. The government acknowledges, as it must, that this is the clear holding of *Lindh*. See U.S. Br. 10 ("[U]nder *Lindh*, that provision [requiring certificates of appealability] does not apply to 'cases pending' on April 24, 1996, the effective date of the Act."). The government further admits that "petitioner's Section 2255 motion was *pending* in the district court" on "April 24, 1996." U.S. Br. 5 (emphasis added). Rather than draw from these two concessions the inexorable conclusion that AEDPA has no application to this case, however, the government maintains that *Lindh* is not controlling and, even more remarkably, urges this Court to limit Hohn's ability to argue otherwise on remand to the Eighth Circuit. The government's request for a limitation on any remand order should be rejected out of hand. Indeed, this Court's decision in *Lindh* provides yet another reason why summary reversal is appropriate.

According to the government (U.S. Br. 10-11), this Court's holding in *Lindh* that AEDPA's amendments to Chapter 154 of Title 28 apply only to "cases pending" on the date AEDPA was enacted is not controlling here because the appellate phase of the proceedings below qualifies as a different "case" from the trial phase. Since what the government calls the "case on appeal" was commenced only *after* the passage of AEDPA (with the filing by Hohn of a notice of appeal), it does not matter, says the government, that Hohn's request for Section 2255 relief was pending in the district court before the statute's enactment. The government cites no

authority to support the novel proposition that the appellate phase of litigation constitutes a separate "case," and our research has uncovered none. Indeed, the only circuit that has adopted the government's position — the Eighth Circuit in *Tiedman* v. *Benson*, 1997 WL 437181 (Aug. 6, 1997) — did so not because the appellate phase constitutes a different "case" but because it could "think of no reason why a new provision exclusively directed towards appeal procedures would depend for its effective date on the filing of a case in a trial court." *Id.* at *6. The dispositive "reason," of course, is supplied by this Court's decision in *Lindh*. Not surprisingly, at least six circuits have concluded that no certificate of appealability is necessary under *Lindh* if the Section 2255 petition was filed in the district court prior to AEDPA's enactment. See *United States* v. *Carter*, 117 F.3d 262, 264 (5th Cir. 1997); *United States* v. *Gutierrez*, 1997 U.S. App. LEXIS 17430, at *2-*3 & n.1 (10th Cir. July 11, 1997) (unpublished opinion); *Nelson* v. *Walker*, 1997 WL 442686, at *14 (2d Cir. Aug. 7, 1997); *Arredondo* v. *United States*, 1997 WL 459716, at *2 (6th Cir. Aug. 13, 1997); *Koo* v. *McBride*, 1997 WL 549557, at *1-*2 & n.3 (7th Cir. Sept. 3, 1997); *Hardwick* v. *Singletary*, 1997 WL 555715, at *1-*2 (11th Cir. Sept. 4, 1997).

To correct the Eighth Circuit's obvious misreading of *Lindh*, and to bring it into line with the unanimous conclusion of other circuits, summary reversal is also warranted.[5]

[5] At a minimum, if the Court decides to vacate and remand for a determination of substantiality, it should not preclude Hohn from raising the *Lindh* argument. Although the government is correct in observing that the petition for certiorari "does not ask this Court to review whether the certificate-of-appealability issue applied in this case" (U.S. Br. 10), it is clear that the retroactivity question, which is jurisdictional, arose only after the certiorari petition was filed when this Court issued its decision in *Lindh*. See also S. Ct. Rule 14.1(a) (issues "fairly included" in questions presented may be considered).

CONCLUSION

The petition for a writ of certiorari should be granted, and the decision below summarily reversed and remanded with instructions to consider petitioner's appeal on the merits.

Respectfully submitted.

ALAN UNTEREINER
EILEEN PENNER
Counsel of Record
ROBERT L. BRONSTON
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000

SEPTEMBER 1997